United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7388

ORIGINAL

To be argued by
LEONARD KOERNER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

BERALDINE L. ACHA and ARLENE M. EGAN,
each individually and on behalf of
all others similarly situated,

Plaintiffs-Appellants,

P/S

-against-

ABRAHAM D. BEAME, individually and in his
capacity as Mayor of the City of New York,
MICHAEL J. CODD, individually and in his
capacity as Police Commissioner of the
New York City Police Department and THE
CITY OF NEW YORK, as a public employer,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

UNITED STATES COURT OF APPEALS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

STATEMENT

The plaintiffs, two former members of the New York City Police Department, appeal from a judgment of the United States District Court for the Southern District of New York (DUFFY, J.), entered on July 2, 1975, denying plaintiffs' application for a preliminary injunction and dismissing the action without leave to amend the complaint.

QUESTION PRESENTED

Plaintiffs, two former policewomen in the New York City Police Department, brought a class action challenging the termination of policewomen from the New York City

Police Department. The complaint alleged that, prior to January 1973, the members of plaintiff class had been subjected to discriminatory hiring practices. It was undisputed that after January 1973, appointments to the police force were made on a non-discriminatory basis. In June 1975, the New York City Police Department, as a result of the City's fiscal crisis, was required to dismiss approximately 5000 police officers. The schedule of layoffs was determined pursuant to Section 80 of the Civil Service Law. Section 80 provides for layoffs by inverse order of seniority. The following question is presented.

Assuming, arguendo, that, prior to 1973, the Police Department had discriminated against the plaintiffs in hiring, does the use of an employment seniority system to determine the order of layoff of employees violate Title VII or 42 U.S.C. §1983?

FACTS

(1)

On June 26, 1975, the plaintiffs, policewomen in the New York City Police Department, commenced a class action on behalf of all women in the police department under federal civil rights laws, Title VII and 42 U.S.C. §1983 (5a). The action sought to enjoin the Police Department from terminating them from the force on June 30, 1975 (5a).*

*Unless otherwise indicated, numbers in parentheses refer to pages in the Appellants' Appendix.

It was alleged that, on June 30, the Police Department, as a result of the City's fiscal crisis, would be required to terminate approximately 5000 police officers (7a). The dismissals would be made according to seniority (13a). All of the 450 female police officers appointed since January 1973 would be terminated (8a).

The complaint further alleged that there are approximately 30,374 members of the uniformed force; approximately 21,669 males and 618 females hold the title of Police Officer (8a). Prior to January 1973, there was a quota of approximately 354 women to be employed in the uniformed force with 223 women in the title of Policewomen (8a). Prior to 1973, women in the Police Department served in the title of Policewoman and men served in the title of Patrolman (9a). The two titles were merged in January 1973 (9a).

Prior to 1969, different examinations were given for the positions of Policewomen and Patrolman (9a). In 1969 examinations were given for Policewoman and Police Trainee/Patrolman (9a, 22a-23a). The Policewoman position was open to candidates who were 19 years of age on the date of the examination (10a, 23a). The Police Trainee/Patrolman position was open to candidates who were 16 years of age on the date of the examination (9a-10a, 22a). The position of Trainee would evolve into the Patrolman position upon the Trainee reaching his 21st birthday (10a). The examinations contained the same questions and were graded the same (9a). Separate

eligible lists were established for each of the examinations (9a).

Between 1970-1973, there was a job freeze in the Police Department (10a). During this period there were no appointments to the positions of Patrolman and Policewoman, but males who had passed previous examinations for trainee were appointed to the Police Department (10a). In January 1973, the Police Commissioner, in removing the job freeze, determined that men and women should be appointed from separate lists pursuant to a ratio of four men to one woman, regardless of comparative grades on the examinations (10a).

The complaint alleged that in 1973 men were appointed to the title of Police Officer prior to women who had taken the same 1969 examination and received higher grades (10a).

Since 1973 approximately 4,236 males and 513 females have been appointed to the position of Police Officer (11a,12a).

The complaint alleged that the plaintiffs were "willing and qualified to take an examination for Policewoman and/or Police Officer subsequent to 1964 and prior to 1969, but no such examination was open to them" (11a).

The complaint concluded that the proposed termination of employment would result in a disproportionate impact on women in the force in violation of their constitutional rights (11a).

At the same time the plaintiffs filed the complaint on June 26, 1975, they applied for a preliminary injunction. In support of their application, the individual plaintiffs submitted affidavits stating that the loss of their jobs would place them in a difficult financial position (42a, 45a).

(2)

In opposition to the application for a preliminary injunction, Cornelius Ryan, Chief of Personnel for the Police Department, stated in an affidavit that 6,529 police officers would be laid off on June 30 as a result of the City's fiscal crisis (60a). The schedule of layoffs was to be based on inverse order of seniority as is required by Section 80 of the Civil Service Law (60a).

Pursuant to the seniority system, the Department would be required to lay off personnel with appointment dates as far back as March 1969 (61). All police officers who took the last administered separate examinations for the position of Patrolman and Policewoman in 1969 were subject to the terminations (61a).

Mr. Ryan stated that any delay in the terminations, as was scheduled by the Police Department, would result in extra cost and require an additional layoff of police officers (61a).

In December 1973, the Department of Personnel, consistent with a determination by the Police Commissioner that the Department's employee needs could be fulfilled

by having one title, gave one examination for all candidates for the position of Police Officer (62a). Mr. Ryan stated that the use of a seniority system for layoff purposes is consistent with the Department's present policy of treating all police officers identically (62a).

Deputy Chief James Sullivan, in an affidavit, set forth in detail the cost to the City if the District Court granted an injunction. Mr. Sullivan stated that the Department would incur a total expense of $10,000,000 if the approximately 500 female police officers were restored to the force (65a).

(3)

The hearing on the preliminary injunction was held on June 30, 1975. During the hearing the parties agreed to stipulate to some of the facts. Prior to 1973, examinations for Policewoman were conducted in 1964 and 1968. During that period more than two examinations were given to male candidates for the position of Patrolman (78a-79a). During this period the written tests for female candidates were identical to the test for male candidates (80a). Between 1969-1973, the Police Department imposed a job freeze (85a). No women were hired but males initially hired as Police Trainees were placed in the position of Patrolman upon reacting the age of 21 (86a). As of December 28, 1972, the quota of female police officers was 355 out of total of 26,414 (84a). In 1973, the examinations for male and female

candidates were intended by the City to be equal (81a).

Approximately 500 of the 6,529 police officers to be laid off are woman (83a). The total force after layoffs will be 19,407 and would include 180 female officers (94a).

At the conclusion of the hearing the City moved to dismiss the complaint for failure to state a cause of action (91a).

On July 1, the District Court, in an opinion, part of which is set forth below, denied the application for a preliminary injunction and dismissed the complaint (98a). On July 30, 1975, the plaintiffs, in a letter to the District court, requested leave to amend the complaint (101a). The plaintiffs sought to add a separate count by pleading facts that would show that a substantial number of the plaintiffs were "direct victims of discrimination in the Police Department" (102a). The defendants, by letter dated August 7, 1975, stated that the new allegations would not state a cause of action (104a-105a).

On August 28, the District Court signed a judgment dismissing the action (112).

OPINION BELOW

The District Court, in upholding the use of a seniority system required by state law for layoff purposes, stated (97a-99a):

> "Plaintiffs contend that from 1963 to 1969, no women were permitted to take a competitive examination for the position

of policewoman (since that time the title "police officer" has been construed to cover both males and females.) However, in 1969, a Civil Service test was given for the post of policewoman and starting in 1972, appointments were made of the named plaintiffs and members of a class. During the same period, at least five examinations were given for policemen, and it is claimed by the plaintiffs that this situation produced discrimination against females on the New York City police force.

The layoffs now proposed will reduce the number of females on the police force by 73.5 per cent, while only 23.9 per cent of males will be discharged.

A claim similar to that raised here is to be found in Jersey Central Power & Light Co. v. Local Union 327, etc., 508 F. 2d 687 (3d Cir. 1975), and in Waters v. Wisconsin Steel Works, 502 F. 2d 1309 (7th Cir. 1974). In both of these cases racial discrimination was claimed whereby blacks were discharged under a personnel cutback which occurred after an effort to alleviate the employer's former racially discriminatory hiring practices. The cutback came when the employer attempted to follow a recognized bona fide seniority system whereby those last hired were first to be relieved of their duties. In both cases the circuit courts held that such a seniority system was permissible.

The fact that the case at bar is bottomed on sexual discrimination does not alter the underlying principle which permits such a seniority system as approved by Section 80 of the New York Civil Service Law. Indeed, such is the mandate of the Congress, found in Section 2000e-j of Title 42 U.S.C., which prohibits 'any employer. . .

to grant preferential treatment to any individual or any group because of . . . sex.' To issue the order sought by the plaintiffs in this case would be directly contrary to that section and to the teachings of other circuits. Under the circumstances, the injunctive applications of the plaintiffs will be denied and the cause will be dismissed."

APPLICABLE STATUTES

TITLE VII OF THE CIVIL RIGHTS ACT

42 U.S.C. §2000e-2

* * * * *

"Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality or production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation

paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."

McKINNEYS NEW YORK CIVIL SERVICE LAW

Section 80

"Suspension or demotion upon the abolition or reduction of positions. - 1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter, provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents * * *."

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION. THE SENIORITY SYSTEM ESTABLISHED BY STATUTE IS NOT RACIALLY DISCRIMINATORY UNDER TITLE VII OR 42 U.S.C. §1983.

(1)

The seniority system established by Section 80 of the New York Civil Service Law is not racially discriminatory.

The use of an employment seniority system, which provides that the last hired will be the first fired, has been upheld in discrimination cases by the Courts of Appeal for the Seventh Circuit in Waters v. Wisconsin Steel Works of Int. Harvester Co., 502 F. 2d 1309 (1974), pet. for cert. filed 43 U.S.L.W. 3476 (February 24, 1975, Docket No. 74-1064), the Third Circuit in Jersey Central Power and Light Co. v. Local Unions 327 etc. of I.B.E.W., 508 F. 2d 687 (1975), pet. for cert. filed 44 U.S.L.W. 3084 (August 12, 1975, Docket No. 75-182), and the Fifth Circuit in Watkins v. United Steel Workers of Am., Local No. 2369, 516 F. 2d 41 (1975).*

In Waters, the plaintiffs, two black journeymen bricklayers, brought an action under Title VII of the

*The issues involved in this appeal are similar to the issues involved in Chance v. Board of Examiners, Docket #75-7161, argued before this Court on August 11, 1975.

Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and Section 1981 of the Civil Rights Act of 1866. Plaintiff Waters, among other things, challenged the existence of Wisconsin Steel's "last hired, first fired" seniority system as being violative of Title VII and Section 1981 because it perpetuated prior discriminatory policies and hiring practices of the defendants. Waters had unsuccessfully sought employment at Wisconsin Steel Works in 1957. He was hired in July 1964 and laid off two months later because of business reasons. In 1967, Waters was recalled, and again laid off two and one half months later because of business reasons.

The District Court held that, prior to April 1964, Wisconsin Steel had discriminated in the hiring of bricklayers. The Court found that the seniority system, established in 1946, was violative of 42 U.S.C. 1981 and not a bona fide seniority system under Title VII. The Court held that Wisconsin Steel Works, in laying off plaintiff Waters in September 1964, had violated Waters' civil rights.

On appeal to the Court of Appeals, Wisconsin Steel argued that an employment seniority system which awarded workers credit for the full period of their employment is racially neutral and is a bona fide seniority system within the contemplation of Title VII, 42 U.S.C. §2000e-2(h). 502 F. 2d at p. 1317. That section specifically states that it shall not be an unlawful employment

practice for an employer to maintain a bona fide seniority and merit system.

The Court of Appeals accepted the defendant's argument, reversed the District Court on the issue of seniority, and found that the plant-wide employment seniority system used by Wisconsin Steel Works did not violate Title VII. In so holding, the Court of Appeals reviewed at length the legislative history of Title VII. The Court quoted from the Interpretative Memorandum of Senators Clark and Case, which stated that Title VII would have no effect on established seniority rights. The memorandum stated that an employer "would not be obliged - or indeed permitted * * *" to give recently hired negroes "special seniority rights at the expense of the white workers hired earlier". 502 F. 2d at p. 1318. The Court of Appeals quoted from the Congressional Record an oral response given by Senator Clark to an inquiry by Senator Dirksen as to whether an employer is discriminating if his contract requires that the employee last hired, even if he is the only negro employed, be first fired. Senator Clark responded that, if the negro was last hired, he can be first fired "so long as it is done because of his status as 'last hired' and not because of his race". 502 F. 2d at p. 1318. The Court then quoted at length from an Interpretive Memorandum on Title VII received by Senator Clark from the United States Department of Justice. The memorandum specifically

stated that Title VII "would have no effect on seniority rights existing at the time Title VII takes effect." The memorandum noted that, for the purposes of layoffs, the seniority system would be applicable "even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes". 502 F. 2d at p. 1319.

The Court, after reviewing the legislative history, stated (502 F. 2d at pp. 1319-1320):

> "Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require as the Fifth Circuit said [Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980 (1969)], that a worker be granted fictional seniority or special privileges because of his race.
>
> Moreover, an employment seniority is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees.
>
> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle does not of itself perpetuate past discrimination. To hold otherwise would

> be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. Griggs v. Duke Power Co., 401 U.S. 424, 430-431, 91 S.Ct. 849, 28 L.ED. 2d 158 (1971)."

The Court, having concluded that the employment seniority system did not violate Title VII, also found that the system did not violate 42 U.S.C. §1981. 502 F. 2d at p. 1320, fn. 4.

In Jersey Central Power & Light Co. v. Local Unions 327, Etc. of I.B.E.W., 508 F. 2d 687 (3rd Cir., 1975), pet. for cert. filed 44 U.S.L.W. 3084 (August 12, 1975 Docket No. 75-182), an employer, a large public utility, seeking to reduce its work force for business reasons, brought a declaratory judgment action to determine whether it was required to adhere to collective bargaining agreement provisions requiring layoffs in reverse order of seniority or whether the employer was obligated to implement the provisions of a conciliation agreement made with the Equal Employment Opportunity Commission and retain among its employees a larger proportion of minority group and female workers. The conciliation agreement contained no express seniority provision nor did it expressly modify or alter the seniority provisions found in the collective bargaining agreement. It was agreed among the parties that layoffs in reverse order of seniority would have a disproportionate effect upon minority group and female

workers. 508 F. 2d at p. 691.

The Equal Employment Opportunity Commission argued, inter alia, that the objectives of the conciliation agreement (to increase the proportion of female and minority group workers) would be defeated if effect was given to the seniority provisions of the collective bargaining agreement. 508 F. 2d at p. 703. The Court of Appeals construed this issue as requiring a determination as to whether the seniority clause "must be modified as being contrary to public policy and welfare", (emphasis the court's). 508 F. 2d at p. 704. The Court of Appeals then reviewed at length the legislative history of Title VII, just as had the Seventh Circuit in Waters. Jersey Central, 508 F. 2d at pp. 706-709.

After reviewing the legislative history, and other federal cases that have interpreted Title VII, the Court stated (508 F. 2d at p. 710):

> "We thus conclude in light of the legislative history that on balance a facially neutral company-wide seniority system, without more, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. If a remedy is to be provided alleviating the effects of past discrimination perpetuated by layoffs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree."

In Watkins v. United Steel Workers of Am.,

Local No. 2369, 516 F. 2d 41 (5th Cir., 1975), all of the blacks previously hired by the company were laid-off because they had the least seniority in the plant. It was undisputed that prior to 1965 the employer had discriminated against blacks. All of the blacks had been hired after 1965, when the employer began to hire pursuant to non-discriminatory hiring practices. In reversing the District Court and upholding the use of a plant-wide seniority system to determine layoffs, the Court cited with approval the decisions of the Courts of Appeals in Waters and Jersey Central, specifically noting that it agreed with those Courts' interpretation of the legislative history of Title VII. 516 F. 2d at pp. 45, 47-48.

The appellants have not cited any decision by a Court of Appeals which holds that a neutral seniority system violates Title VII or 1983. They do cite decisions by the appellate courts involving departmental seniority (App. Br., p. 30, Amicus Brief of EEOC, pp 17-18, 24). As we shall show below, Waters, Jersey Power and Watkins properly distinguished between departmental seniority actually earned and constructive or fictional seniority in a plant-wide seniority system.

In a departmental seniority system, seniority is measured by length of service in a particular department. Where the courts have found that minorities have been restricted to lower paying departments, the courts have permitted the aggrieved individuals to be transferred

to the higher paying departments with full recognition accorded to the time actually worked by each of the employees in the lower paying departments. The courts have reasoned that departmental seniority systems are not "bona fide" under 42 U.S.C. 2000e-2(h), since, unless minority employees are given credit for work in lower paying jobs, no minority employee would transfer to the higher paying department and, as a result, any court ordered remedy to correct the prior discrimination would be ineffective. See United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir., 1971); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir., 1971) pet. for cert. dism. 404 U.S. 1006 (1972); United States v. Chesapeake and Ohio Railway Co., 471 F. 2d 582 (4th Cir., 1972), cert. den. sub nom. Locals 268 and 1130 of Brotherhood of Railroad Trainmen v. United States, 411 U.S. 939 (1973); United States v. Hayes International Corp., 456 F. 2d 112 (5th Cir., 1972); Local 189, United Papermakers and Paperworkers v. United States, 416 F. 2d 980 (5th Cir., 1969), cert. den. 397 U.S. 919 (1970); United States v. Jacksonville Terminal Company, 451 F. 2d 418 (5th Cir., 1971); Bing v. Roadway Express, 485 F. 2d 441 (5th Cir., 1973); Pettway v. American Cast Iron Pipe Company, 494 F. 2d 211 (5th Cir., 1974); United States v. N.L. Industries, 479 F. 2d 354 (8th Cir., 1973); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va., 1968). See also, Heard v. Mueller, 464 F. 2d 190

(6th Cir., 1972). Cf. Franks v. Bowman Transportation Co., 495 F. 2d 398 (5th Cir., 1974), cert. grant. 43 U.S.L.W. 3510, March 25, 1975 (plaintiffs requested the Court to grant retroactive seniority to the time when individual plaintiffs had applied for jobs with the company but were rejected for discriminatory reasons); Meadows v. Ford Motor Company, 510 F. 2d 939 (6th Cir., 1975) (Court of Appeals reversed and remanded to District Court for new hearing as to whether individual plaintiffs are entitled to retroactive job seniority for the period that the hiring of those individuals was delayed because of discriminatory practices).

In three of the departmental seniority cases cited above, the courts, in construing Title VII's legislative history, have distinguished between giving individual plaintiffs credit for seniority actually earned and giving all minority employees fictional seniority, for the purpose of layoffs, in an employment seniority situation such as is involved in the instant case.

In United States v. Bethlehem Steel, this Court, in commenting on the memorandum on Title VII submitted by Senators Clark and Case, discussed ante p. 13, which stated that blacks were not to be given special seniority rights at the expense of white members hired earlier, stated (446 F. 2d at p. 661):

> "That memorandum, however, in focussing on formerly white-only plants, seems to say at most that the seniority of a white on the job will not be affected by the

> claims of blacks hired after he was. As we make clear below in discussing the precise relief to which we believe the government is entitled, the discriminatorily assigned employees who transfer will not receive 'special seniority rights' or 'super seniority'. Their seniority rights will be no greater than that awarded more fortunate employees. Both groups will bid against each other for vacancies on the basis of plant-wide seniority; and earlier hired white employee will have greater seniority than a later hired black."

In Local 189, United Papermakers and Paperworkers v. United States, the Court of Appeals for the Fifth Circuit, in commenting on 42 U.S.C. 2000e-2(h), which section preserved the bona fide seniority system, stated (416 F. 2d at pp. 994-995):

> "No doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act [Title VII] could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination."

In Quarles v. Philip Morris, Inc., the District Court, after reviewing the legislative history of Title VII, stated (279 F. Supp. at 516):

> "Several facts are evident from the legislative history. First, it contains no express statement

> about departmental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority. Second, the legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require 'reverse discrimination'; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."

Later in the opinion, the Court, in evaluating the proposals of the parties as to an appropriate remedy, stated (279 F. supp. at p. 519):

> "Additionally the plaintiffs' proposal, while not ousting white employees from present jobs, would prefer Negroes even though they might have less employment seniority than whites. Nothing in the act [Title VII] indicates this result was intended."

See also, United States v. Chesapeake and Ohio, 471 F. 2d 582, 588 (4th Cir., 1972), cert. den. sub nom. Locals 268 and 1130 of Brotherhood of Railroad Trainmen v. United States, 411 U.S. 839 (1973) ante, p. 18 (Court of Appeals found part of relief granted by District Court

to be too broad because relief included two classes of employees hired after effective date of Act [Title VII] who were not victims of discrimination).

The decisions of the Courts of Appeals in Waters Jersey Power, and Watkins, preserving employment seniority systems for the purpose of determining layoffs after non-discriminatory hiring procedures have been established, are consistent with prior decisions of the Courts of Appeals, including this Court, which have construed the legislative history of Title VII. We believe they are persuasive authority and should be followed by this Court in the instant case.

(2)

In addition to being supported by precedent, we submit that the preservation of the employment seniority system is supported by strong policy considerations. The use of a seniority system for laying off civil service workers is established by New York State Law. Civil Service Law §80. In both the public and private sectors of employment, a provision regarding seniority is contained in a large number of collective bargaining agreements in the United States. Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harvard Law Review 1109, 1159 (1971). Seniority is very important to the worker, "determing his competitive status and potentially providing him with considerable job security" (id.). Seniority acts as an incentive for an

employee to remain with one employer. The seniority system provides an employer with a neutral method of determining which employees are to be laid off for business reasons. It is undisputed that the Police Department has pursued non-discriminatory hiring policies since 1973 (62a,81a). To require a quota system for the purpose of layoffs and therefore give less senior females a fictional seniority greater than seniority actually earned by some males would affect the morale of all the employees and heighten tension among the female and male police officers.

To avoid this problem the appellants suggest that the City be required to "rehire the appellants without laying-off or deferring the reinstatement of any other police officer" (App. Br., p. 37). The purpose of the layoffs is to reduce the Police Department's budget, which reduction is necessitated by the City's monumental fiscal crisis. The appellant's suggestion, to say the least, does not further this purpose. This suggestion has not been adopted by any court.

We do not dispute that the preservation of an employment seniority system, if there are layoffs, will have a greater effect on the female employees who have been recently hired to compensate for the effects of past discrimination. With respect to these competing interests it is submitted that the use of an employment seniority system to determine layoffs maintains a proper balance.

The Courts, through hiring quotas and promotion (involving departmental seniority) without regard to seniority, can give minorities adequate preferential treatment to compensate them for past discrimination.

Title VII recognizes the difficult problem of reconciling the need for preferential treatment and the need to preserve a plant-wide seniority system in Section 2000e-2(h), which preserves bona fide seniority systems. If a seniority system, as is involved in the instant case, does not come within the purview of Section 2000e-2(h), that section is rendered meaningless.

It is noteworthy that the decisions of this Court indicate a reluctance to impose hiring quotas except under the most compelling circumstances. See Patterson v. Newspaper and Mail Deliverers Union, 514 F. 2d 767, 775-776 (2d Cir., 1975) (concurring opinion of Judge FEINBERG); Rios v. Enterprise Ass'n Steamfitters Loc. 638 of U.A., 501 F. 2d 622, 634 (2d Cir., 1974) (dissenting opinion of Judge HAYES); Bridgeport Guardians Inc. v. Members of Bridgeport C.S. Commission, 482 F. 2d 1333, 1340 (2d Cir., 1973). Cf. Griggs v. Duke Power, 401 U.S. 424, 430-431 (1971); Kirkland v. New York State Dept. of Correctional Services, 520 F 2d 420 (2d Cir., 1975).

Courts have refused to order preferential quotas for the limited purpose of hiring where, prior to the commencement of the lawsuit, the employer has voluntarily terminated his discriminatory practices.

See Wade v. Miss. Coop. Ext. Service, 372 F. Supp. 126, 146-147 (W.D. Miss., 1974); Commonwealth v. Glickman, 370 F. Supp. 724, 736 (W.D. Pa., 1974); Arrington v. Mass. Bay Transp. Authority, 306 F. Supp. 1355, 1359-1360 (D. Mass., 1969). Cf. Bridgeport Guardians Inc. v. Members of Bridgeport Civil Service Comm., 482 F. 2d 1333, 1340 (2d Cir., 1973). As we noted above, in the instant case it is undisputed that the Police Department has pursued non-discriminatory hiring policies since 1973.

(3)

In support of their position appellants cite Schaeffer v. Tannian, 9 EPD par. 10, 142 (E.D. Mich., 1975), and Loy v. City of Cleveland, 8 FEP Cases 614 (N.D. Ohio, 1974) (App. Br., pp. 22,25,27,29,37). Both Schaeffer and Loy relied on the decision of the district court in Watkins v. United States Steel Workers, 369 F. Supp. 1221 (E.D. La., 1974). In Schaeffer, the Court acknowledged that the decisions of the Court of Appeals in Waters and Jersey Central Power supported the position of the defendants but held that Watkins presented the better view. 9 EPD par. 10, 142 at p. 7646. As we discussed above, supra, pp. 16-17, Watkins has been reversed. Indeed, in reversing the district court, the Court of Appeals in Watkins expressly repudiated the Schaeffer decision. 516 F. 2d at p. 45.

The appellants argue that Waters, Jersey Central

and Watkins are distinguishable from the instant case because they did not deal "explicitly with the perpetuation of discrimination" (App. Br., p. 36). This distinction lacks merit. Each of the three cases specifically rejected the argument by a plaintiff that the use of a seniority system would perpetuate prior discriminatory practices. Waters, 502 F. 2d at p. 1317; Jersey Central, 508 F. 2d at pp. 704-705; Watkins, 516 F. 2d at p. 45. In the Waters case, upon which the Courts of Appeals in Jersey Central and Watkins relied, the employer had been found to have actually engaged in discriminatory practices. Moreover, one of the plaintiffs, prior to being hired, had applied for a job with the company and had been turned down for discriminatory reasons. 502 F. 2d at pp. 1312-1313.

Appellants further attempt to distinguish Waters, Jersey Power and Watkins, by arguing that Section 2000e-2(h) was intended to preserve seniority systems in private employment where the discriminatory practices were in effect prior to the effective date of Title VII (App. Br., pp. 25-26). The appellants conclude that since discrimination by a public employer has always been prohibited by §1983, Section 2000e-2(h) was not intended to cover them (id.). Understandably, appellants have not cited any support for their position. Public employers were included in Title VII in 1972, eight years after the effective date of Title VII. Without any authority indicating to the contrary, it is submitted

that an employer who has been included after the effective date of the Act is subject to all of the Act's provisions, not just the provisions the plaintiffs find most palatable at the time of a lawsuit.

Moreover the Courts of Appeal in Waters and Watkins specifically found that the use of a seniority system did not violate under §1983.

(4)

In Point II of their brief, appellants argue that a remedy under §§1981, 1983 is not restricted by the legislative history of Title VII and the section of Title VII [42 U.S.C. 2000e-2(h)] which preserves bona fide seniority systems (App. Br., p. 39). This precise argument was raised in Waters v. Wisconsin Steel Works of Int. Harvester, 502 F. 2d 1309 (7th Cir., 1974), pet. for cert. filed 43 U.S.L.W. 3476 (February 24, 1975 Docket No. 74-1064) (App. Reply Brief, pp. 24-25). In Waters the plaintiffs sued under 42 U.S.C. §1981 and under Title VII. In the initial Waters decision, 427 F. 2d 476 (1970), the Court of Appeals, in holding that the union local could, under certain circumstances, be sued directly in district court without previously being charged before the Equal Employment Opportunity Commission under Title VII, indicated that the two sections should be harmonized wherever possible. 427 F. 2d at pp. 481, 484-487. On the second appeal, 502 F. 2d 1309, as noted above, ante, p. 15, the Court, after concluding that the

employment seniority system did not violate Title VII, stated (502 F. 2d at p. 1320, fn. 4):

> "Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. §1981 ."

Similarly, in Watkins v. United Steel Workers of A. Local No. 2369, 516 F. 2d 41 (5th Cir., 1975), the plaintiffs challenged the seniority system as being violative of Title VII and 1983. The Court of Appeals concluded that the contractual seniority rights did not violate Title VII or §1983.516 F. 2d at p. 50.

In Howard v. Lockheed Georgia Co., 372 F. Supp. 854 (N.D. Ga., 1974), the Court refused to allow the plaintiff to seek compensatory and punitive damages under Section 1981, in addition to back pay, on the ground that such damages are not available under Title VII. In rejecting the plaintiff's contentions, the Court stated, in language particularly applicable to this case (372 F. Supp. at pp. 857-858):

> "Were this Court to allow recovery sought in the instant action under Section 1981, such a conflict [earlier described by the Court as irreconcilable] would indubitably be created; for to judicially legislate a concurrent and broader remedy under Section 1981 would invite every plaintiff asserting a claim for racially discriminatory employment practices to ignore the remedy which Congress so carefully constructed in Title VII."

See, also, Stamps v. Detroit Edison, 515 F. 2d 301, 308-309 (6th Cir., 1975), reversing in part 365 F. Supp. 87 (E.D. Mich., 1973) (action brought under §1981 and Title VII; Court of Appeals set aside punitive damages on ground such damages are not authorized under Title VII); Long v. Sapp, 502 F. 2d 34, 39 fn. 2 (5th Cir., 1974).

The Supreme Court has recognized Title VII and §1981 as "parallel and overlapping remedies against discrimination." Alexander v. Gardner-Denver, 415 U.S. 36, 47 fn. 7 (1974). Plaintiffs in discrimination cases, as in the instant case, usually assert a cause of action under §§1981 and 1983 and a cause of action under Title VII. A separate, inconsistent body of substantive law for each statute would create unnecessary confusion in discrimination law and make more difficult the proper adjudication of rights. It is urged that Sections 1981 or 1983 cannot be used to invalidate a seniority system preserved under Title VII. The legislative history of Title VII and the specific statutory provision in Title VII approving bona fide seniority systems should be applicable to challenges to the seniority system under Sections 1981 or 1983.

Even if the legislative history of Title VII is found by this court not to be applicable to actions under Sections 1981 or 1983, the reasons discussed above, ante, pp. 22-24 in support of the preservation of a racially neutral employment seniority system are applicable to actions brought under these sections and support our

argument that the use of a seniority system, instead of a racial quota system, for laying off police officers complies with the requirements of Sections 1981 and 1983.

Johnson v. Railway Express, 95 S. Ct. 1716 (1975, n.o.r.), is not contrary to our position.. In Johnson, the Supreme Court, reaffirming principles which it had established in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), held that an action brought under §§1981, 1983 is independent of an action brought under Title VII. In Johnson the Court held that the timely filing of a charge of employment discrimination under Title VII does not toll the running of the statute of limitations applicable to §§1981, 1983 actions.

In our argument, consistent with Johnson, we recognized that Title VII actions and actions brought under §§ 1981, 1983 are separate. Similarly, we are not arguing that this Court, in this action brought under Title VII and §1983, is restricted to the remedies available under Title VII. It is our position that the legislative history of Title VII, specifically approving bona fide seniority systems, constitutes a declaration by Congress in favor of employment seniority systems and should be considered by this Court in determining whether the use of a seniority system for excessing purposes violates §§1981 and 1983, or is inconsistent with rights guaranteed thereunder.

(5)

Appellants argue that they should have been permitted to amend the complaint to add a cause of action for those plaintiffs who had been the victims of discrimination (App. Br., p. 44). In support of their position, they cite Watkins v. United Steel Workers of Am., Local No. 2369, 516 F. 2d 41 (5th Cir., 1975). Watkins does not support their position. The Court in Watkins upheld a seniority system where none of the minority plaintiffs had shown they were the victims of prior discriminatory hiring practices. In so holding, the Court stated it would not decide the rights of laid-off employees who could show they had been specifically aggrieved by the employers prior discriminatory practices. 516 F. 2d at p. 45.

As we noted above, ante p. 25, Waters v. Wisconsin Steel Works, 502 F. 2d 1309 (7th Cir., 1974), pet. for cert. filed 43 U.S.L.W. 3476 (February 24, 1975, Docket No. 74-1064), held that an employee who had been refused employment for discriminatory reasons was not entitled to fictional seniority. In Jersey Central Power and Light v. Local Union 327 et al., 508 F. 2d 687 (3rd Cir., 1975), pet. for cert. filed 3084 (August 12, 1975, Docket No. 75-182), the court upheld a bona fide seniority system despite its disparate impact on women and minorities who had recently been hired pursuant to a conciliation agreement with EEOC. The conciliation agreement resulted

from a charge of discrimination in violation of Title VII. The charge had been investigated by the EEOC who found reasonable cause to believe there was discrimination in hiring and job assignments.

It is noteworthy that Watkins cited the decisions of the Courts of Appeal in Waters and Jersey Power with approval and relied on those courts' interpretation of Title VII. Section 2000e-2(h) of Title VII. In view of this history and the Fifth Circuit's opinion in Local 189, United Papermakers and Paperworks v. United States, 416 F. 2d 980 (5th Cir., 1969), cert. den. 397 U.S. 919 (1970), discussed ante at p. 20, there is no reason to assume that the Fifth Circuit would be sympathetic to the appellant's argument.

The additional cause of action sought to be added to the complaint would also give the plaintiffs fictional seniority, which relief we have shown is inappropriate under Title VII and §1983.

CONCLUSION

THE JUDGMENT APPEALED FROM
SHOULD BE AFFIRMED, WITH COSTS.

November 5, 1975.

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

being duly sworn, says, that on the 5 day of NOV., 1975

at No. 6666 - 3RD AVE. in the Borough of MANH., in The City of New York, he served three copies

of the annexed APPEAL BRIEF upon MIA. GORDON Esq.,

the attorney for the PLTFF-APPLTS in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, th 5
day of NOV. 1975

Bruce Harper

Carlos M Rodriguez

Carlos M Rodriguez
Commissioner of Deeds
City of N Y 2-803
Expires Oct 1. 1977

Form 170-1M 4/68(2)(6)